

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 24, 2012

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-11-9415; TCEQ Docket No.; 2011-2253-PWS-E
In Re: Old Tymer Enterprises, Inc.

Dear Mr. Trobman:

I have reviewed both parties' Exceptions to the Proposal for Decision and the Executive Director's (ED's) Reply to Exceptions. In the attached Amended Order, I have made the editing changes requested by the ED. I agree with the ED that the TCEQ docket number on the Proposal for Decision (PFD) is incorrect and the correct TCEQ docket number is 2011-2253-PWS-E. However, to conserve resources, I have not issued an Amended Proposal for Decision since no other changes are necessary to that document.

I disagree with the exceptions filed by Old Tymer Enterprises, Inc., and think that the issues raised in those exceptions have been adequately addressed in the PFD and the ED's Reply to Exceptions.

Sincerely,

A handwritten signature in cursive script, reading "Sarah G. Ramos".

SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SGR:cm
Enclosures
cc: Mailing List

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STYLE/CASE: OLD TYMER ENTERPRISES INC

SOAH DOCKET NUMBER: 582-11-9415

REFERRING AGENCY CASE: 2011-2253-PWS-E

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE

ALJ SARAH G. RAMOS

REPRESENTATIVE / ADDRESS

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OLD TYMER ENTERPRISES, INC.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties against
and Requiring Corrective Action by
OLD TYMER ENTERPRISES, INC.
TCEQ DOCKET NO. 2011-2253-PWS-E
SOAH DOCKET NO. 582-11-9415**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by Old Tymer Enterprises, Inc. (Respondent). A Proposal for Decision (PFD) was presented by Sarah G. Ramos, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the EDPRP on May 8, 2012.

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Respondent owns and operates a convenience store with a public water system (PWS) located at 28295 Interstate Highway 10 West, Boerne, Bexar County, Texas (the Facility).
2. The Facility has a well, provides water for human consumption, has approximately three service connections, and serves at least 25 people per day for at least 60 days per year.
3. Respondent purchased the Facility from AMK Enterprises, Inc. (AMK) in June or July 2009.
4. Respondent has operated the Facility at least since August 1, 2009, and Amarjit Jolly is the person responsible for the Facility's day-to-day business operations and oversight.
5. Respondent failed to collect routine distribution water samples for coliform analysis at the Facility for August 2009 through May 2010 and failed to provide a public notification for the failure to collect routine distribution coliform samples from August 2009 through April 2010.

6. Respondent failed to pay public health service fees, including late fees, for 2010.
7. On September 15, 2011, the Executive Director (ED) filed the EDPRP in accordance with Tex. Health & Safety Code § 341.049(c), alleging that Respondent failed to collect routine distribution samples for coliform analysis and for the months of August 2009 through May 2010 and failed to provide a public notification for the failure to collect routine distribution coliform samples for the months of August 2009 through April 2010, in violation of Tex. Health & Safety Code § 341.033(d) and 30 Tex. Admin. Code (TAC) §§ 290.109(c)(2)(A) and 290.122(c)(2)(B).
8. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$7,370 against Respondent and requiring corrective action by Respondent.
9. The total proposed administrative penalty of \$7,370 was calculated as follows:
 - a. Respondent's failure to monitor had the potential but did not actually cause major harm to human health, which resulted in a reduction of the base penalty to \$250 per event ($\$1,000 \times 25\%$);
 - b. Respondent failed to perform required monitoring for 10 different months (from June 2008 through January 2010), resulting in a \$2,500 base penalty ($\250×10 events);
 - c. Good faith efforts to comply were not applicable because Respondent did not provide retroactive monthly samples;
 - d. The Facility had two prior orders against it within the past five years, resulting in a 50% enhancement to the base penalty;
 - e. The Facility had 26 similar notices of violation (NOVs), resulting in a 130% enhancement to the base penalty and one dissimilar NOV, resulting in a 2% enhancement to the base penalty;
 - f. The amount of \$320 was added to the base penalty to account for what it would have cost to comply with the monitoring requirement;
 - g. Respondent's total adjusted penalty was \$7,370; and
 - h. Justice does not require a further penalty adjustment.
10. The ED recommended that Respondent be required to implement corrective measures to comply with applicable coliform monitoring requirements; to implement procedures to ensure that all necessary public notifications are provided in a timely manner to customers of the water system; to pay the 2010 public health service fees with applicable penalties and interest; and to submit written certification and supporting documentation to demonstrate compliance.
11. On February 15, 2011, the ED mailed a copy of the EDPRP to Respondent at its last address of record with the Commission.
12. On March 29, 2011, Respondent requested a hearing on the ED's allegations.

13. On January 21, 2011, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.
14. On August 12, 2011, the Chief Clerk mailed a notice of hearing to Respondent, the ED, and the Office of Public Interest Counsel.
15. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
16. On April 27, 2012, the ED mailed a copy of the Second Amended EDPRP to Respondent at its address of record with the Commission.
17. On May 8, 2012, ALJ Ramos convened a hearing at the SOAH hearing facilities, William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Staff attorneys Jennifer Cook and Stephanie Frazee represented the ED, and attorneys Bradford E. Bullock and Arturo D. Rodriguez, Jr., represented Respondent. The Office of Public Interest Counsel did not participate in the hearing. The record closed on June 20, 2012.
18. An administrative penalty of \$7,370 is reasonable and takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Tex. Health & Safety § 341.049 and in the Commission's 2002 Penalty Policy.
19. The corrective actions required are reasonable.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Tex. Water Code § 5.013 and Tex. Health & Safety Code § 341.049.
2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a PFD with Findings of Fact and Conclusions of Law, pursuant to Tex. Gov't Code Ch. 2003.
3. Under Tex. Health & Safety Code § 341.049, the Commission may assess an administrative penalty against a person who violates a provision of Subchapter C of the Texas Health and Safety Code or a rule or order adopted thereunder.
4. Under Tex. Health & Safety Code § 341.049, the penalty may not exceed \$1,000 per violation, and each day of a continuing violation may be considered a separate violation.

5. As required by Tex. Health & Safety Code § 341.049(d) and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP, Second Amended EDPRP, and of the opportunity to request a hearing on the alleged violations or the penalties proposed therein.
6. As required by Tex Gov't Code §§ 2001.051 and 2001.052; Tex. Health & Safety Code § 341.049; 1 TAC §§ 155.401; and 30 TAC §§ 1.11 and 39.25, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. Commission rule 30 TAC § 290.38(66) defines a PWS as a system for providing the public water for human consumption through pipes or other conveyances. The system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.
8. The Facility is a PWS.
9. Tex. Health & Safety Code § 341.033(d) provides that the owner or manager of a PWS that furnishes drinking water to less than 25,000 people shall submit to the Commission during each month of the system's operation at least one specimen of water taken from the supply for bacteriological analysis.
10. Tex. Health & Safety Code § 341.031 authorizes the Commission to adopt and enforce rules to implement the federal Safe Drinking Water Act.
11. Commission rule 30TAC § 290.109(c)(2) requires a public water system serving a population of less than 1,000 to perform routine distribution coliform sampling at least once per month.
12. Commission rule 30 TAC § 290.122(c)(2)(B) requires the operator of a public water system who fails to perform required water monitoring to notify persons served by the system of the failure to perform the required monitoring in a manner reasonably calculated to reach such persons for at least seven days or as long as the violation exists.
13. Respondent violated Tex. Health & Safety Code § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A) and 290.122(c)(2)(B).
14. In determining the amount of an administrative penalty, Tex. Health & Safety Code § 341.049(b) requires the Commission to consider several factors including:
 - The nature, circumstances, extent, duration, and gravity of the prohibited acts;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

16. Based on consideration of the above Findings of Fact, the factors set out in Tex. Health & Safety Code § 341.049(b), and the Commission's Penalty Policy, the ED correctly calculated the penalties for the alleged violations and a total administrative penalty of \$7,370 is justified and should be assessed against Respondent.
17. Within 10 days after the effective date of this Order, Respondent will begin complying with applicable coliform monitoring requirements by collecting routine coliform distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 TAC § 290.109. This provision will be satisfied upon six consecutive months of compliance monitoring and reporting.
18. Within 10 days after the effective date of this Order, Respondent will implement procedures to ensure that all necessary public notifications are provided to the customers of the Facility in a timely manner, in accordance with 30 TAC § 290.122.
19. Respondent will submit payment for all outstanding fees, interest, and penalties for TCEQ Financial Administration Account No. 90150363.
20. Within 195 days after the effective date of this Commission Order, Respondent shall submit written certification and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with the Order.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Respondent is assessed an administrative penalty of \$7,370 for its violations of Tex. Health & Safety Code § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A) and 290.122(c)(2)(B). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that were not raised in this case. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." The payment shall be sent with the notation "Old Tymer Enterprises, Inc., Financial Administration Account No. 90150363; TCEQ Docket No. 2011-2253-PWS-E" to:

Financial Administration Division, Revenues Section
Attention: Cashiers Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 10 days after the effective date of this Order, Respondent will begin complying with applicable coliform monitoring requirements by collecting routine coliform distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 TAC § 290.109. This provision will be satisfied upon six consecutive months of compliance monitoring and reporting.
3. Within 10 days after the effective date of this Order, Respondent will implement procedures to ensure that all necessary public notifications are provided to the customers of the Facility in a timely manner, in accordance with 30 TAC § 290.122.
4. Within 30 days, Respondent will submit payment for all outstanding fees, interest, and penalties for TCEQ Financial Administration Account No. 90150363. The payment shall be sent with the notation "Old Tymer Enterprises, Inc., Financial Administration Account No. 90150363" to:

Financial Administration Division, Revenues Section
Attention: Cashiers Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

5. Within 195 days after the effective date of this Commission Order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions 1 through 4. The certification shall be notarized by a Texas notary public and include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitted false information, including the possibility of fines and imprisonment for knowing violations.

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

A copy should be sent to:

Public Drinking Water Section Manger
San Antonio Regional Office

14250 Judson Road
San Antonio, Texas 78233-4480

6. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
7. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
8. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Tex. Gov't Code § 2001.144.
9. As required by Tex. Health & Safety Code Ann. § 341.049(h), the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
10. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission